STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2004
v	No. 243435 Wayne Circuit Court
ATHIR NAJIB QARANA, Defendant-Appellant.	LC Nos. 01-013436-01; 01-013437-01

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of criminal sexual conduct in the fourth degree, MCL 750.520e(1)(b) (use of force), and one count of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). He was sentenced to concurrent terms of sixteen months to two years on the CSC-4 convictions and to thirty-eight months to ten years on the assault conviction. Defendant was acquitted of a fourth count which charged third-degree criminal sexual conduct, MCL 750.520d(1)(b) (digital penetration achieved by force). Defendant now appeals and we affirm.

Defendant's convictions arise out of two separate, unrelated incidents at the party store he owns in Livonia, The Brass Mug. Although separately charged, the two cases were joined for trial. In the first case, the victim, HG, testified that she stopped at defendant's store to use the pay phone. Defendant was working behind the counter, came out around the counter and approached her from behind. He then put his hand up her shirt and fondled her breasts. Defendant then pushed HG over the counter and put his hand down her pants, digitally penetrating her vagina. The incident ended when a customer came into the store. HG testified that she did not consent to defendant's activities. This incident resulted in one of the CSC-4 convictions and the acquittal on CSC-3.

The second incident occurred when CK went to The Brass Mug to make a purchase. As she was checking out at the register, defendant came out from behind the counter and asked CK to touch him in the genital area, which she refused to do. Defendant grabbed CK tightly and kissed her; CK told him to stop. Instead, defendant reached under her shirt and fondled her breasts, touching her for a minute or two. He then put his hand down the front of her pants. As he was trying to get his hand deeper, CK managed to get his hand out of her pants before he reached her vagina. Defendant then stuck his hand down the back of her pants and also took the victim's hand and rubbed it on his crotch. As with the other incident, it was without the victim's

consent and ended when a customer entered the store. This incident resulted in the other CSC-4 conviction and the assault conviction.

Defendant first argues that he was denied a fair trial by several comments made by the prosecutor during closing argument. Specifically, defendant complains of the following statements made during the prosecutor's closing argument:

> I've listened to the case carefully and, quite frankly, I've been trying to figure out what the defense is to this. I've been trying to figure it out. So I'd ask you to listen carefully to Mr. O'Connell, so we'll both learn what the defense is. But what I can gather is, blame the victim. Blame the victim.
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> * * *
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> For that, she deserved to be molested by him is, apparently, the defense in this case. Because there is no other defense that I heard in this case. There is no other defense.
>
> * * *
>
> Ask yourselves, how could they [the two victims] have possibly come up with the exact same story, unless it happened?
>
> Once you resolve that issue, this case is over and done with and he's guilty of all four counts.
>
> * * *
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> Why would [HG] have put herself through what she did, gone to the point of going to the hospital to, basically, be raped again by a doctor or a nurse . . ..
>
> * * *
>
> If it walks like a duck, talks like a duck, it's a duck. It's a rapist.
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> Proof beyond a reasonable doubt. The Judge is going to instruct you on that. I have to prove this case to you, beyond a reasonable doubt. I accept that. Quite frankly, it's not that hard to prove this case, beyond a reasonable doubt. I want to talk about what I don't have to do, though. I don't have to prove this beyond a shadow of a doubt. And the reason I mention that is I hear that stupid expression on T.V. all the time. You'll never hear the Judge say it. You'll never hear Mr. O'Connell say it. And you never will hear me say beyond a shadow of a doubt. Throw it out of your mind. The term does not exist, except for T.V. I don't have to prove it beyond a shadow of a doubt. I don't even know what that means.

Defendant also complains of the following statements made by the prosecutor in rebuttal:

> If in this country you can be assaulted because you go out and buy booze and cigarettes at that party store, then I – then our victims are guilty, as counsel wants to make them out to be.
>
> This is a classic case of blame the victim. Didn't even talk about his client. Didn't even talk about him. Why? There's nothing to say. There's nothing to say.
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> * * *
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> This case comes – [defense counsel] says I've to the difficult job [sic]. I completely disagree. I've got the easiest job in the world on this case. I come up and I put up two credible witnesses and police officers. Counsel has the tough job in this case. He's got to try to find and manufacture a defense.
>
> In this country you're allowed – everybody has the right to a trial by jury. It doesn't give you a right to a defense. I ask you, I implore you to do your job and to return the only verdict you can and that's guilty of all counts.
>
> Counsel goes through this whole thing about [HG] and I can't – couldn't help myself. Why would she go through this? Why would she sit out there put herself [sic] – to get even with her boyfriend she would wet herself on the sidewalk. To get even with her boyfriend, she would subject herself to going to the police department, for God knows how long, and being interviewed that night. To get even with her boyfriend she's going to go to the hospital and have a pelvic examination performed on her. To get even with her boyfriend, she went to 16th District Court and testified and was subjected to cross-examination. Because of the fun of that, she came down here on the hottest day of the year and probably paid sixteen dollars for parking so she could go through this. There's no motivation, ladies and gentlemen. It's nonsense. Nonsense. It doesn't make sense.

Depending upon the particular statement, defendant argues that these statements denigrated defense counsel and the defense, shifted the burden of proof, commented on defendant's right to remain silent, improperly commented on the credibility of prosecution witnesses, misstated the law, or was otherwise inappropriate or disparaging.

In no instance were any of these comments objected to at trial. Therefore, we review defendant's claims under the plain error rule. *People v Carines*, 460 Mich 750; 602 NW2d 576 (1999). To avoid forfeiture of an issue under the plain error rule, three requirements must be met: 1) there must have been an error, 2) the error must be plain, i.e., obvious or clear, and 3) the substantial rights were affected by the error. *Id.* at 763. The last requirement generally needs a showing of prejudice, that the error affected the outcome. *Id.* The burden of showing prejudice rests with the defendant, not the prosecutor. *Id.* And even where the defendant meets this burden, we must exercise our discretion to determine if reversal is warranted, which occurs only when the error results in the conviction of an actually innocent person or when the error seriously affects the fairness, integrity or public reputation of the proceedings independent of the

defendant's innocence. *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

For the most part, we see no plain or obvious error in the comments by the prosecutor. The only comments that are somewhat troubling are those that suggest that defendant had the difficult job of coming up with a defense. A criminal defendant, of course, has no obligation to present a defense, and to the extent that the prosecutor suggested otherwise, that was improper. *People v Bass (On Rehearing)*, 223 Mich App 241, 247; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866; 577 NW2d 667 (1998). But in any event, even if we regard this as a plain or obvious error, or even if we regard any of the other challenged statements as plain or obvious error, defendant has not demonstrated any prejudice meriting reversal. As explained in *Carines, supra*, the burden rests with defendant to demonstrate how he was prejudiced by the error. In this case, defendant makes no such showing beyond a merely conclusory statement that he was prejudiced. For the most part, the statements defendant now challenges were merely arguments regarding why the prosecutor's witnesses were believable. At most, it might be said that the comments suggesting that defense counsel had a difficult job because he had to manufacture a defense for defendant was potentially prejudicial in shifting the burden of proof to defendant. But even in that respect, defendant falls short of demonstrating prejudice. The statement was not particularly egregious and the jury did, in fact, acquit defendant on one of the four charges.

Furthermore, even if we were to conclude that defendant has, in fact, demonstrated prejudice, we still must exercise our discretion in determining whether reversal is required. Reversal is required only if the error resulted in the conviction of an actually innocent defendant or if the error seriously affects the fairness, integrity or public reputation of the proceedings. *Carines, supra* at 763. There is no showing here that defendant is actually innocent. Moreover, none of the statements, even if error, seriously affects the fairness, integrity or public reputation of the proceedings. Again focusing on the comments which suggest defendant had to prove a defense, those comments were relatively innocuous and were made during rebuttal in response to defense counsel's argument that the prosecutor had a difficult time proving guilt. While the prosecutor could perhaps have worded his response better, without a suggestion that defendant had something to prove, we cannot say that the prosecutor's statement seriously affected the fairness, integrity or public reputation of the proceedings.

For the above reasons, we conclude that defendant has not satisfied his burden under the plain error rule.

Defendant next argues that there was insufficient evidence to support the assault with intent to commit criminal sexual conduct involving penetration charge and that the trial court erred in denying his motion for directed verdict. Specifically, defendant argues that although there was evidence that he put his hand down the pants of CK, there was no evidence that he did so intending to digitally penetrate her, and, therefore, the trial court should have granted a directed verdict on this charge. We disagree.

We review a claim of insufficiency of the evidence by looking at the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). In the case at bar, CK testified that defendant had put his hand down her

pants and that he was moving his hand towards her vagina, but that she was able to remove his hand before he reached her vagina. Furthermore, the jury also heard testimony from HG that defendant had digitally penetrated her in the other incident. Defendant does point out that he was acquitted on the charge of digitally penetrating HG. But that overlooks the fact that the ruling on the directed verdict motion obviously came before the jury's verdict. At the point the trial judge had to determine whether to submit the assault count to the jury, looking at the evidence in the light most favorable to the prosecutor, the jury could have concluded that defendant had penetrated HG and was intending to do the same to CK given the similarity of the two offenses. Furthermore, defendant's argument that the jury must not have believed HG when she testified that defendant penetrated is merely speculative. That certainly may be the reason that the jury acquitted defendant on the CSC-3 charge. But that certainly is not the only possibility. For example, the jury may have erroneously believed that they had to decide between the two charges with respect to HG and picked CSC-4, perhaps thinking it was the more serious offense. The point is that any analysis as to why the jury acquitted defendant on the CSC-3 charge is mere speculation and would be an exercise in looking at the evidence in the light most favorable to defendant, not in the light most favorable to the prosecutor.

In short, when the evidence is viewed in the light most favorable the prosecutor, the jury could reasonably have concluded from that evidence that defendant intended to digitally penetrate CK had she not been successful in removing his hand from the front of her pants, and, therefore, the trial court properly denied the motion for directed verdict.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage